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May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 6, 2004

Case No.: TIA-0239

XXXXXXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the

Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a chemical operator and a laborer at the Fernald Plant (the plant). In his application, he stated that he worked at the plant for approximately 6 years -- from 1953 to 1959. He requested physician panel review of five illnesses -- melanoma, prostate cancer, Parkinson's disease, colon polyps, and heart problems. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on all illnesses. The Panel found that the Applicant had melanoma but concluded that it was not related to his employment at DOE. For the rest of the illnesses, the Panel cited the lack of clinical confirmation or characterization of the illnesses. The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant objects to the Panel statements about the lack of clinical confirmation or characterization of the illnesses. The Applicant states that he understood that he needed to submit physician reports concerning melanoma and prostate cancer, and the Applicant states that he did submit those reports.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

As indicated above, the Appeal concerns the Panel's statements that the record lacks clinical confirmation or characterization of various illnesses. Since the Panel did not make that statement in its melanoma determination, there is no objection to consider concerning that claimed illness.

With respect to the remaining claimed illnesses - prostate cancer, Parkinson's disease, colon polyps, and heart problems - the Applicant has not identified OWA or Panel error. We reviewed the record concerning the Applicant's claim that he submitted information on prostate cancer. We found only two references to the Applicant's prostate cancer, which were contained in letters from the DOL. See OWA Record at 117, 118. While the letters acknowledge the presence of the Applicant's prostate cancer and existing medical evidence supporting prostate cancer, the record does not contain those records. Accordingly, the Panel had no way of reviewing the condition and its possible occupational etiology. If the Applicant wishes to pursue his claims of prostate cancer, Parkinson's disease, colon polyps, and heart problems, the Applicant should pursue the issue of documentation with the DOL.

As the foregoing indicates, the Applicant has not identified OWA or Panel error and, therefore, the appeal should be denied.

In compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims.

OHA's review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0239 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 3, 2005